

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARI TERESA MILLS,

Defendant-Appellant.

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UNPUBLISHED

May 2, 2006

No. 259455

Oakland Circuit Court

LC No. 2004-197907-FH

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of failure to stop at the scene of an accident that resulted in serious impairment or death, MCL 257.617. She was sentenced to one and a half to five years in prison for her conviction. She appeals as of right. We affirm.

Defendant first alleges that she was denied her constitutional right to testify. This claim of error does not provide defendant any entitlement to relief. In the present case, defense counsel advised the trial court that defendant recently notified him of her intent to testify on her own behalf despite legal advice to the contrary. In the process of placing that acknowledgment on the record, defendant noted that she wanted to do so, but counsel did not think that she should. The trial court advised counsel that, as the sentencing court, discussions regarding the decision to testify should occur off the record, and defense counsel was given the opportunity to discuss the issue with defendant privately. When trial resumed, a short videotape was played, and the defense rested. Outside the presence of the jury, the trial court addressed jury instructions and whether the defense needed to place any other matters on the record. At that time, defendant stated that counsel would not let her testify to which defense counsel responded, "I have advised my client not to take the stand in this matter." The trial court stated that it was not a question of defense counsel precluding his client from taking the stand.

The right to testify on one's own behalf at a criminal trial, although not absolute, is guaranteed by due process. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 533-534; 560 NW2d 651 (1996). Furthermore, a trial court has no duty to ascertain on the record that a defendant has intelligently and knowingly waived his right to testify. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995). If the record established that a defendant decided not to testify or acquiesced in his attorney's decision that he not testify, the right to testify will be deemed waived. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). The denial of a defendant's right to testify is subject to a harmless error analysis because the

prosecution bears a heavy burden of demonstrating that the error was harmless beyond a reasonable doubt in light of the uncertain effect of the defendant's testimony on the jury. *Solomon, supra* at 538. Application of the harmless error rule promotes judicial economy without sacrificing fairness because of the high burden placed on the prosecution. *Id.*

Following review of the entire record, any error in failing<sup>1</sup> to allow defendant to testify was harmless beyond a reasonable doubt. An eyewitness to the accident testified that defendant was driving a car that hit a pedestrian and subsequently sped off. Initially, it appeared that defendant's vehicle would make a right hand turn, but after the accident, it suddenly cut across multiple lanes of traffic to execute a "Michigan left." The driver of the vehicle, identified as defendant by the eyewitness, appeared to be looking around to determine if she was being followed. The eyewitness was able to give a description of the vehicle involved in the accident and obtain the license plate of the vehicle. That information was provided to police and led to information from the registered owner and his son, defendant's boyfriend, that defendant had the vehicle in her possession in the city of Royal Oak. The damage to defendant's vehicle, the loss of the passenger side mirror, was consistent with the damage found at the accident scene. Furthermore, after learning from her boyfriend that police were looking for the vehicle involved in the accident, defendant reported to police and admitted that she hit someone, but stated that she did not mean to hit anyone. Another eyewitness testified that she was driving behind defendant when she hit a man crossing the street. This eyewitness stated that defendant moved out of the lane of travel and sped away from the scene. She further testified that the volume on her radio was loud, but she still could hear the impact from the "hit" because it was "so strong." This evidence clearly established that defendant hit the victim with her car and knowingly drove away. Thus, any error was harmless beyond a reasonable doubt in light of the evidence admitted at trial. *Solomon, supra*.

Defendant next alleges that she was denied her constitutional right to the effective assistance of counsel. We disagree. When an evidentiary hearing is not held to address the issue of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). Any factual findings by the lower court are reviewed for clear error, but questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

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<sup>1</sup> We assume, without deciding, the question of whether defendant was deprived of her right to testify because of the lack of clarity in the lower court record regarding acquiescence. Furthermore, defendant failed to submit an affidavit or other documentary evidence at the trial court level to establish what her testimony would have been. We decline defendant's invitation to adopt the judicial interjection rule set forth in *US v Pennycooke*, 65 F3d 9 (CA 3, 1995). In *Simmons, supra*, this Court did not impose a formal waiver requirement of the right to testify, noting that the right to testify is countered by the privilege against self-incrimination. This Court reasoned that, to exercise the right against self-incrimination, the defendant need not claim the privilege, but simply does not testify. *Id.* at 684-685. When he elects not to testify, he waives the privilege to do so. *Id.* at 685. This Court held that a formal inquiry would introduce possible error into the trial when other possible remedies were available. *Id.*

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy that a court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *Id.* Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant alleged that trial counsel was ineffective for failing to present a defense and failing to perform as an advocate. We disagree. The defense theory of the case was that defendant failed to stop at the scene of the accident because she was unaware of the fact that she had been involved in a serious injury accident with a pedestrian. In support of this theory, the defense elicited testimony from the eyewitnesses to the accident that defendant never applied her brakes. Although a police officer testified that defendant admitted that she hit someone, another police officer testified that defendant stated that she heard a bump and thought she hit *something*. The defense also presented a witness who testified about the poor lighting conditions at the time of the accident and the victim's dark clothing. A videotape, purportedly of the lighting conditions, was also admitted by the defense and played for the jury.<sup>2</sup> Based on the record available, the defense presented its theory of the case with the witnesses called either by the prosecutor or the defense.

Defendant alleges that if she was advised and subsequently called to testify, she could have refuted "alleged statements made by her, as well as the unexplained blood alcohol content." However, decisions regarding the evidence to present and the witnesses to be called are matters of trial strategy that will not be reviewed with the benefit of hindsight. *Dixon, supra*. In the present case, defendant was able to introduce her theory of the case without exposing herself to cross-examination. Moreover, the prosecutor did not introduce the preliminary breath test during the case in chief, but noted that the evidence could be admitted if defendant "opened the door." Therefore, counsel's decision to advise defendant not to testify was sound trial strategy. Defendant failed to meet the high burden of establishing ineffective assistance of counsel under the circumstances.

Defendant's challenge to lack of advocacy because of statements made in closing argument also fails. During closing argument, defense counsel told the jury that he had advised defendant not to testify. While defendant contends that this statement demonstrates lack of advocacy, on the contrary, it appeared that the statement was an inappropriate jury nullification

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<sup>2</sup> The videotape was not preserved in the lower court record, and we must rely on the parties' appellate pleadings to support the nature of the content of the video.

argument. See *People v Demers*, 195 Mich App 205, 206-207; 489 NW2d 173 (1992). In any event, trial counsel was not rendered ineffective based on the statement, and the trial court admonished the jury that the arguments of counsel are not evidence.

Defendant next alleges that the trial court abused its discretion when it allowed the results of defendant's blood test into evidence. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "'Relevant evidence' means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the actions more probable or less probable than it would be without the evidence." *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995), quoting MRE 401. When a defendant pleads not guilty, all relevant evidence of any element of an offense may be admitted subject to MRE 403. *Id.* at 70-71. MRE 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* at 75. Evidence of motive is relevant. *People v Fisher*, 449 Mich 441, 452-453; 537 NW2d 577 (1995). To be admissible, the test results from a chemical test for blood alcohol level must be both relevant and reliable. *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001). To admit evidence of a blood alcohol level test, a prosecutor is not required to show the reasonableness of the delay between the time of the offense and the time of the test or otherwise show that the blood alcohol analysis was reliable because the passage of time pertains to the weight and not the admissibility of the evidence. *People v Wager*, 460 Mich 118, 125-126; 594 NW2d 487 (1999).

Here, the prosecution offered the results of defendant's blood test into evidence to establish that defendant had alcohol and illegal drugs in her system nine hours after the incident in question. In order to convict defendant of the charged crime, the prosecution needed to establish that defendant knew or had reason to believe that she had been involved in an accident resulting in serious impairment of a body function or death and failed to immediately stop. MCL 257.617. Therefore, the results of the blood test were relevant to establish that defendant had a motive to leave the scene of the incident despite her knowledge that she had been involved in an accident that resulted in serious impairment of a body function or death. *Mills, supra*; *Fisher, supra*. Furthermore, the fact that defendant's blood draw was administered approximately nine hours after the accident in question does not diminish the relevancy of the blood test results because the passage of time between an incident and a resulting blood draw pertains to the weight and not the admissibility of the results of the test. *Wager, supra*. Finally, because the delay in administering the blood draw impacted the weight of the evidence, the probative value of the results of the blood test was not substantially outweighed by the danger of unfair prejudice. *Mills, supra*. Therefore, the trial judge did not abuse her discretion when she admitted the results of the blood test into evidence.

Furthermore, we conclude that defendant has abandoned her argument that the blood test results should not have been admitted into evidence because the prosecution failed to satisfy the minimum foundational requirements of the test. In order for the results of chemical tests of blood alcohol to be admitted into evidence, the proponent of such tests must establish that the operator was qualified, the proper method or procedure was followed, the tests were performed within a reasonable time after the arrest, and the testing device was reliable. *People v Tipolt*, 198

Mich App 44, 46; 497 NW2d 198 (1993). Here, defendant's brief on appeal does not list the aforementioned requirements, nor does the brief state what requirement the prosecution failed to establish, and thus, defendant has abandoned this issue on appeal. An appellant may not simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate his arguments, and then search for authority either to sustain or reject his position. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. *Id.*

Defendant's final issue on appeal is that she was denied her due process right to a fair trial when the trial court failed to hold an evidentiary hearing in regard to the admission of defendant's blood test, and furthermore, was denied her constitutional protection against self-incrimination when the trial court admitted the results of her blood test into evidence. We disagree with defendant's due process argument, and conclude that defendant has abandoned her self-incrimination argument. Constitutional issues are reviewed by this Court de novo. *People v Akins*, 259 Mich App 545, 559; 675 NW2d 863 (2003).

In relevant part, MCR 6.110(D) provides:

If, during the preliminary examination, the court determines that evidence being offered is . . . admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court on the basis of . . .

(3) if there was no prior evidentiary hearing, a new evidentiary hearing.

Defendant argues that the aforementioned court rule provides her a right to an evidentiary hearing and, in turn, when such hearing was denied, denied her of her due process right to a fair trial. We disagree.

Applying the plain and unambiguous language of MCR 6.110(D), *People v Strong*, 213 Mich App 107, 111; 539 NW2d 736 (1995), we conclude that MCR 6.110(D) merely provides that if the trial court made an evidentiary ruling on a piece of evidence (with or without an evidentiary hearing) during the preliminary examination, the defendant is not precluded from moving for an evidentiary hearing in regard to that same piece of evidence at trial. MCR 6.110(D). If the trial court had made an evidentiary ruling regarding the blood test, the trial court was still not required to grant defendant an evidentiary hearing in regard to the blood test pursuant to MCR 6.110(D). Therefore, defendant's argument, that her due process rights to a fair trial were infringed upon when the trial court denied her request for an evidentiary hearing, fails.

Furthermore, defendant has provided no authority for her claim that admission of the blood test results infringed upon her constitutional right against self-incrimination. Thus, defendant's argument that the admission of the blood test results infringed upon her constitutional right against self-incrimination has been abandoned on appeal. As previously

stated, defendant may not leave it to this Court to search for authority to sustain her position.  
*Kevorkian, supra.*

Affirmed.

/s/ Karen M. Fort Hood

/s/ David H. Sawyer

/s/ Patrick M. Meter